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Office of Administrative Law Judges
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Issue Date: 18 August 2004

Case No.: 2002-LHC-1065
OWCP No.: 10-38667

In the Matter of:

ROBERT CUTHBERTSON
Claimant

v.

AMERICAN COMMERCIAL LINES HOLD
Employer

and

AMERICAN LONGSHORE MUTUAL ASSOC.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

John J. Osterhage, Esq.
For the claimant

Douglas A. U'Sellis, Esq/
For the employer

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER

This case involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. § 901 *et. seq.*), hereinafter referred to as the Act. Following proper notice to all parties, I conducted a formal hearing on April 14, 2003, in Cincinnati, Ohio.

Stipulations

The parties submitted the following stipulations:

1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq*.);

2. The Claimant and the Employer were in an employee-employer relationship at the time of the injury;

3. The accident and the resultant right ankle, left foot and low back injuries arose out of and in the scope of employment;

4. The accident occurred on August 23, 2000, while Claimant was working as a stevedore for the Employer;

5. The Employer had timely notice of the injury;

6. The Claimant filed a timely claim for compensation on December 4, 2000, and the Employer filed a timely notice of controversion on December 12, 2000;

7. The Claimant's weekly wage averaged $ 545.69;

8. Employer paid temporary benefits of $363.81 per week for 40 5/7 weeks, totaling $14,812.26, from August 23, 2000, through June 4, 2001; and permanent partial disability of $5,220.67, less credit of $2,483.08 taken for overpayment of temporary, partial disability;

9. Employer paid medical benefits of $ 19,790.98;

10. Claimant did not work after the accident, and;

11. The claimant reached maximum medical improvement as of April 24, 2001 for his back and as of June 4, 2001 for his ankle.

These stipulations, admitted into evidence, are therefore binding upon Claimant and Employer. 20 C.F.R. § 18.51; *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985) the undersigned finds that the stipulations offered may serve to meet the respective parties' burden of persuasion. The undersigned has carefully reviewed the foregoing stipulations and finds that they are reasonable in light of the evidence in the record. As such, the same are hereby accepted as findings of fact and conclusions of law.

Contested Issues

The unresolved issues include:

1. Loss of wage earning capacity or extent of disability of the Claimant due to his ankle and back conditions;

2. Whether the injury temporarily aggravated a chronic back condition;

3. Whether an attorney fee may be claimed by the prior counsel for Claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law, I make the following conclusions and findings of fact.

Background

The claimant, Robert Cuthbertson, worked for Employer as a stevedore unloading 50-foot steel beams from barges on the Ohio River. TR 13-18. He began working for Employer in 1999 and worked until the date of his injury. TR 13, 15, 21,43. He maintained consistent employment from the age of 14 or 15, until the date of injury, in manual labor positions, including work as an animal hide grader for approximately nine years preceding his stevedore position. TR 16, 18. Although he completed the ninth grade, Mr. Cuthbertson's reading ability equates to a third or fourth grade level[1] and his IQ of 72 places in him in the borderline area for intellectual capability and consequently, limits the range of entry level jobs he is capable of performing. ER Post-hearing Brief at 11. Mr. Cuthbertson, fifty years old at the time of the hearing, is married with three minor children at home. He had been the sole provider for his family at the time of his injury. ER Post-hearing Brief at 3.

In his deposition, Claimant testified that he had two previous workers' compensation claims for back injuries. TR 20. In 1994, he reported a back injury while working as a hide grader and prior to that he reported a back injury while working at a chemical company. EX 13. Time off work for these injuries consisted of a few weeks and a few months, respectively. Claimant asserts that these previous injuries to his back resolved completely and he experienced no limitations in his physical abilities while working for Employer. TR 20.

1 Employer challenges this by asserting in its Post-hearing Brief that Claimant testified that he was able to read newspapers and magazines and therefore, he possesses a higher reading ability. This was not Claimant's testimony, however. When asked if he experienced difficulty reading newspapers, he responded that he could pick out words, which provide clues to the meanings of the other words. TR 19.

Claimant testified that he experiences constant pain. TR 37. He has sharp and dull pain in both feet, his right ankle, right leg, and both hips and his back. TR 35-38. Pain disrupts his sleep and prohibits him from sitting in one place for extended periods. TR 40, 44. He is able to lift up to 20 lbs once and 5-10 lbs. repetitively. TR 52-53. He claims pain and discomfort affect his ability to stand in one place for more than ten minutes on some days but on his periodic (about once a month) "good days" he may be able to stand for a few hours. TR 44, 48. He uses a cane to walk any significant distance. TR 46. Mr. Cuthbertson believes stooping, crawling, and or climbing are beyond his physical limitations. TR 47-48. His pain medication precludes him from being able to drive or operate heavy equipment. TR 32. I find Claimant's testimony to be very credible, he testified in a forthright manner.

Mrs. Cuthbertson also testified as to Claimant's pain, difficulty sleeping, and his inability to complete routine household tasks due to pain and discomfort. TR 64-68. I find her testimony credible and substantiating of Claimant's testimony.

The Injury and Initial Treatment

On August 23, 2000, Claimant suffered an injury while working on a coil of steel. TR 17-18, 22-23. On the day of his injury, Claimant assisted his supervisor with raising a coil in order to repair a loose screw. *Id.* Using a "C-clamp" off the rig and a forklift, the supervisor and Mr. Cuthbertson placed chains around the coil. At some point the 1,500-pound "C-clamp" fell off the tow motor, hit Mr. Cuthbertson in the back, pushed him, fractured his leg, ankle and toes, dislocated several toes, and pinned him to the ground by landing on his legs. TR 23-25, EX-13.

At the emergency room, Mr. Cuthbertson underwent a series of x-rays and examinations. TR 26. The treating physician determined that he suffered from a right ankle fracture, a lumbar strain, a fracture to the right fibula with disruption, and fracture and dislocation of numerous toes on his left foot. ER Post-hearing Brief at 9; CX 1. He received a cast on his broken leg up to the knee. TR 29, 31. He underwent two surgeries. The first, performed by Dr. Sorger on August 25, 2000, involved internal screw fixation and open reduction of the right ankle and left toes, respectively. EX 1. Thereafter he received home therapy. TR 30-31.

Subsequent Treatment and Medical Evidence

Mr. Cuthbertson treated with several physicians after his initial treatment and visits with Dr. Sorger at University Hospital. Following initial treatment, Dr. Sorger referred Claimant to Dr. Brannon for his back strain. CX 1-53. Mr. Cuthbertson also treated with Dr. John Roberts for back pain. CX 1-45. Drs. Sandra Eisele, Richard Sheridan and Martin Fitzhand provided examination reports of Mr. Cuthbertson. CX 1-61-72. Additionally, Spectrum Rehabilitation records show chiropractic care provided to Claimant. CX 1-73-98. At the time of the hearing, Mr. Cuthbertson's medications included Neurontin, Nabumentone, Zoloft, Hydrochlodrothiaz, Cyclobenzaprine, and Amitriptyline and he was continuing treatment with Dr. Michelle Tobao for pain. CX 19, TR 32-33.

Dr. Sorger's Treatment

Post-surgical follow-up visits began on September 8, 2000, and continued until June 4, 2001. On September 11, 2000, Dr. Sorger examined Claimant again finding the x-rays revealed aligned phalangeal joints of the left foot, reduced syndesmosis of the right ankle, and reports of pain and numbness along his right side as well as right-sided back pain and pain in his tibia. On October 9, Dr. Sorger noted that Mr. Cuthbertson had tenderness in his lower back and pain in his feet. The doctor prescribed physical therapy sessions of three times per week for four weeks. During the second surgery, conducted on October 27, 2000, Dr. Sorger removed the plate and syndesmosis screw in the right ankle. At that time, Dr. Sorger recommended treatment with Dr. Brannon for the back injury.

As of November 17, 2000, Dr. Sorger restricted Claimant's return to work because he utilized a cane when walking. EX 1 at 7. At that time, he reported an anticipated return to work with light duty restriction in January of 2001 due to decreased ability to ambulate. EX 1 at 8. The doctor also estimated his maximum medical improvement date as February 2001 and that he would be able to return to his former position, but that he may have a permanent restriction for his ankle and an unknown restriction for his back.

Thereafter, Dr. Sorger wrote on January 22, 2001, that Mr. Cuthbertson could return to work without restriction after his next follow-up appointment in February 2001. CX 1 at 38. On February 22, 2001, however, Dr. Sorger ordered three more weeks of physical therapy at three visits per week for Mr. Cuthbertson's ankle and renewed his prescription for Vicodin for the pain and Vioxx. CX 1 at 39-40. At the April 9, 2001 visit, Dr. Sorger noted that "he has been sent to a chiropractor for evaluation…As far as therapy goes, he is going to see the chiropractor and see if the chiropractor can help with his ankle also." CX 1 at 41. At his last visit, Dr. Sorger noted "I'm not sure why he is having all this pain. As far as going back to work, as far as I'm concerned he can go back. His real problem is pain and he can't work with this pain. I have encouraged him to talk to his lawyer about getting him rated for dis-ability." EX 1 at 10. The record is devoid of a description of Claimant's job duties, however, Dr. Sorger did respond to a request for a progress report that stated he worked as a "stevedore."

Dr. John Roberts

Dr. Roberts treated Mr. Cuthbertson on January 9, June 22 and September 4 of 2001, and performed a lumbar MRI on August 28, 2001. CX 1 at 45-52. At the initial visit, Dr. Roberts noted that the chief complaint for Mr. Cuthbertson was his low back pain, that he walked with a slightly antalgic gait using a cane, and that he was able to stand on his toes and heels without difficulty. CX 1 at 45. Upon forward flexion and extension, Mr. Cuthbertson experienced increased low back pain. CX 1 at 46. There existed tenderness along the midline with palpitation. Radiographs taken that day revealed degenerative changes appropriate for age but with no bony abnormalities. In the doctor's assessment, Claimant suffered from a lumbar sprain or strain and should continue his current temporary total disability. He advised that Mr. Cuthbertson

should not return to work. CX 1 at 47. He referred Claimant to Dr. John Brannan for rehabilitation to address the low back injury and determined that surgery was not a treatment option.

At the June 22 visit, Dr. Roberts noted that Mr. Cuthbertson "has not done well overall," that he continues to have spasm with any attempted activities and that he was highly frustrated. CX 1 at 48. Examination revealed an antalgic gait with diffuse swelling, 15 degrees of dorsification, and 20 degrees of plantar flexion related to the ankle. His back revealed a 50% of anticipated range of motion of the spine, negative straight leg raise and moderate amount of spasm on forward flexion. The plan developed included an MRI of the back, consultation with Dr. Jim Sammarco regarding the ankle, and a prescription for Indocin (50 mg.). CX 1 at 48. The prognosis stated "Unknown. I have advised him that there is a reasonable chance that the back problem is unsolvable and it may be something that he will have to live with." Dr. Roberts released Mr. Cuthbertson to return to sedentary duty of lifting 0-10 lbs, sitting, and occasional walking or standing.

An MRI performed on August 28, 2001, showed multilevel disc desiccation, L2-3 and L3-4 annular bulge (nominally compressive), facet arthropathy at L5-S1 (left greater than right and left lateral recess) and neural foraminal encroachment associated with neural effacement. CX 1 at 50. Dr. Roberts felt that the MRI indicated only minor discogenic changes and no major pathology. CX-1 at 52. As of September 4, 2001, Dr. Roberts indicated that Mr. Cuthbertson could not return to duty even to sedentary work. CX 1 at 51. His assessment, that Claimant had not reached MMI, entailed a referral for chronic pain management and a second opinion on the ankle as well as a disability finding of total and temporary. CX 1 at 51-52.

Dr. John Brannon

On February 2, 2001, Dr. Brannon of the Beacon Orthopaedics and Spine Care Center diagnosed Claimant with a lumbar and thoracic strain and contusion due to his work-related injury but found no structural or neurological abnormalities. CX 1 at 54. He recommended chiropractic and physical therapy for his back (10 visits) but did not feel that surgery would be helpful. CX 1 at 55-57. At his March 2001, appointment, Dr. Brannon examined Claimant, finding decreased flexion range to 60 degrees and extension to 20 degrees. CX 1 at 56. He opined "regarding his back, I think return to his usual duties could be possible…" in a month, "but because of his feet and ankle problems, I think returning to his usual duties will not be likely within a short period of time. He further stated, "[C]onsideration of a chronic pain management program should be offered as should vocational rehab." He ordered an additional six therapy sessions. CX 1 at 58. Mr. Cuthbertson underwent epidural steroid injections in his low back and extensive physical therapy. Despite his physical therapy, Claimant continued to feel back pain, pain in his right ankle and in both feet and hips. TR 37. Claimant did not attend his last appointment with Dr. Brannan who noted that he did not make significant gains in chiropractic care and had achieved his baseline as of April 23, 2001. CX 1 at 98.

Dr. Sandra Eisele

Employer referred Claimant to Dr. Eisele on February 5, 2001, for an orthopedic evaluation. CX 1 at 61. Dr. Eisele performed a physical examination, patient history, present history of injury, and a review of the x-rays. CX 1 at 63. Her impressions include good surgical results on the toes but persistent stiffness and pain of the left foot, persistent pain with mild reduction of range of motion in the right ankle and weakness of the right leg. *Id.* She attributed the pain in his left forefoot and stiffness of it to his injuries but would not recommend further surgery on his left second toe unless his bunion deformity was also corrected to allow the second toe to regain normal alignment.[2] She also recommended removal of the plate and screws in his foot because they are symptomatic. In her opinion, Claimant needed more therapy to improve his strength and range of motion in the left forefoot and right ankle and should be on his feet a minimal amount of time with frequent position changes in any work situation. CX 1 at 63. She also opined that Claimant would not be able to resume his previous employment at this time but instead would benefit from 4-6 months of therapy and increases in his activities. She did not express any opinion as to his back.

Dr. Richard Sheridan

On July 26, 2001, Dr. Sheridan interviewed and examined Claimant and provided a consultative report. CX 1 at 65, RX 4. He took a past medical history, reviewed x-rays of the right ankle and the left foot, the claimant's vocational history as well as his subjective complaints. The examination revealed lumbar spine motion of 70 degrees in flexion and full in other modes. CX 1 at 66, RX 4 at 19. He ambulated with a right-leg limp and reports use of a cane as needed. The doctor noted poor heel walking on the right and squatting was 50% of standard and required support. RX 4. As to his lower extremities, Claimant exhibited 20 degrees dorsiflexion and 20 degrees plantar flexion in motion of the left great toe. The left second, third, and fourth toe motion was 10 degrees in dorsiflexion and plantar flexion. CX 1 at 66, RX 4. The right ankle motion consisted of 20 degrees in both dorsal and plantar flexion and 10 degrees in right subtalar motion in inversion and eversion. Dr. Sheridan reviewed the reports by Drs. Eisele and Sorger and the surgical reports. He expressed the opinion that the diagnosis stemming from the 2000 work injury was a resolved acute low back strain, healed fracture of the right lateral malleolus, healed disruption of the right inferior tibiofibular syndesmosis, healed dislocations of the left second and fourth metatarsophalangeal joints, and a healed fracture of the left third metatarsal neck. CX 1 at 68, RX 4 at 21.

Dr. Sheridan estimated that Claimant exhibited a combined value disability due to his back (0%), ankle, foot and toes of 8% whole man impairment. Specifically, he found 3% whole man, 7% right lower extremity, 10% right foot for impairment in right ankle motion, and 1% whole-man, 2% right lower extremity, 3% right foot impairment for impairment in right subtalar motion. He allocated 1% whole-man, 2% left lower extremity, 3% foot impairment for decreased motion in the left great toe, joint, and 2% whole-man, 5% left lower extremity, 7% foot impairment for decreased motion in the left second third, and fourth metatarsophalangeal joints.

2 Claimant possesses a genetic abnormality of having six toes on each foot.

He then allocated 2% whole-man, 5% lower left extremity impairment for decreased sensation in the common peroneal nerve topography. Lastly, Dr. Sheridan found Claimant to be at maximum medical improvement. CX 1 at 69, RX 4.

By facsimile dated August 16, 2001, Dr. Sheridan provided final ratings of the right ankle at 7% and to the left foot of 15%. RX 4 at 23. Thereafter, on September 7, 2001, Dr. Sheridan wrote to the Employer's carrier that Mr. Cuthbertson could perform medium work with some restrictions for time while sitting and standing. RX 4 at 24. On October 9, 2001, he opined that Claimant retained the physical capacity to perform each of several jobs on a list. The list of jobs included security guard, electronic assembly (manual dexterity, lifting up to 35 pounds, standing/ walking less than two hours per day), machine operator (requires good finger dexterity, lifting 45 pounds occasionally and 20-30 pounds usually) and bench assembly (lifting no more than 25-35 pounds, no more than two hours standing/walking). RX 4 at 26-33.

Dr. Martin Fritzhand

Dr. Fritzhand examined Claimant on January 28, 2002 and provided a consultative report discussing his findings and diagnoses. CX 1 at 70-73. He performed a physical examination, took a patient history, a description of the work injury and list of subsequent treatments. He recorded subjective complaints of pain in the low back, feet, and ankles as well as stiffness and inability to weight-bear, ambulate or stand for short periods. Dr. Fritzhand's examination of Mr. Cuthbertson revealed a limping antalgic gait, squat ability at 50 % of standard, tenderness on palpitation of the lower back and difficulty bending forward to 80 degrees. Extension of the spine was diminished to ten degrees with lateral flexion of the spine diminished to 15 degrees bilaterally. CX 1 at 71. Straight leg raising was also diminished to 50 degrees on the left and 40 degrees on the right.

The lower extremities exam revealed a smaller circumference of the right calf by ¼ inch. Plantar flexion of the ankle is diminished to 5 degrees on the right and 10 degrees on the left, and dorsification is diminished to 5 degrees on the right and 15 degrees on the left. Inversion is diminished to 3 degrees on the right and 2 degrees on the left with eversion diminished to 0 degrees bilaterally. His toes present minimal movement and metatarsal extension of the great toe is diminished ten degrees with interphalangeal flexion diminished to 5 degrees. The lesser toes reveal diminished metatarsal extension from 0 to 5 degrees.

In Dr. Fritzhand's opinion, Mr. Cuthbertson's range of motion studies in the ankles and feet are "markedly depressed." He could not rule out root damage to the Achilles tendon where reflexes were absent. CX 1 at 72. He found Claimant's subjective complaints corroborated by the objective findings. Using the AMA Guides to the Evaluation of Permanent Impairment Fifth Edition, Dr. Fritzhand cited to Tables 15-8,9, and 18 to assess the lumbar spine and Tables 17-11, 12, and 14 to assess the ankles and feet. He assigned a 38% whole body impairment to Mr. Cuthbertson for his work-related injuries.

Rebuttal of Dr. Fritzhand's Report by Dr. Sheridan

Dr. Sheridan reviewed the January 28, 2002, report of Dr. Fritzhand and contested the statement regarding possible nerve root damage based on the lack of reflexes in the Achilles' tendon. In Dr. Sheridan's opinion, Dr. Fritzhand's comments are equivocal because symmetrical absent reflexes are normal in lieu of motor deficits or weaknesses. He also challenges use of the Range of Motion Model to assess the lumbar spine impairment as inappropriate where Mr. Cuthbertson does not meet the criteria set forth. He notes the discrepancy between the diminution of motion in the ankles and joints found by Dr. Fritzhand compared to his own findings. Lastly, he questions Dr. Fritzhand's calculations that led him to arrive at his 38% whole person impairment.

Dr. Alan Kohlhaas

On September 9, 2001, Dr. Kohlhaas examined Claimant and provided an independent medical evaluation. EX 3. After conducting a physical history, a work history, history of injury, and current symptoms, Dr. Kohlhaas performed a physical. He notes the use of a cane but also notes that it shows little use. He finds right and left lateral bending to be 30 degrees with 85 degrees lumbar flexion and 10 degrees extension. Straight leg raises in a sitting position are 90 degrees without difficulty. The right ankle shows extension of 20 degrees, flexion of 35 degrees and total subtalar motion of 25 degrees. Calves measure the same and toe sensation is intact except for the second left toe, which also shows 0 degrees flexion and extension of 20 degrees. The third toe evinces a 25-degree flexion and a 25-degree extension.

In his opinion, Mr. Cuthbertson has reached MMI for all three injuries, shows decreased range of motion in his right ankle (although adequate for everyday activities), but his subjective complaints regarding his back pain are unsupported by the objective findings. He does not believe any further treatments are necessary. He identified a mild impairment of the right ankle constituting a 3% whole person impairment. In addition, he did not find the lower back injury caused any impairment, 0%, because he considered the low back strain resolved. Dr. Kohlhaas did not address any impairment or non-impairment related to his feet or toes nor did he rely on the x-rays or reports of other physicians.

Home Health Care Records

Starting on September 6, 2000, Mr. Cuthbertson received home health care following his injury and surgery. CX 1 83. He received gait training, therapeutic exercises and transfer activities addressing his ankle and foot/toe injuries.

Comprehensive Physical Therapy Services

Dr. Brannan referred Mr. Cuthbertson to physical therapy to address his lumbar strain. CX 1 at 89. He received an evaluation on February 13, 2001, which revealed forward flexion of 30 degrees, side bend right of 20 degrees and left of 24 degrees. Rotation right was 10 and left

14 degrees with extension of 10 degrees. CX 1 at 90. His therapist noted decreased range of motion and strength in his back and recommended ten visits at three times per week. Mr. Cuthbertson attended all ten sessions as recommended.

Spectrum Rehabilitation Records

Claimant participated in physical therapy for his lumbar injury and ankle from January 23, 2002 to April 8, 2002. CX 1 at 80. His received nine therapy sessions. The notes reveal excellent cooperation and a good attitude on Mr. Cuthbertson's part.

University Hospital Records

Claimant treated at the emergency room of University Hospital on October 24, 2001 for back and leg pain. CX 1 at 124-25. Examination revealed full range of motion of the lower extremities and mild tenderness of the low back. The diagnosis related to chronic pain associated with the work injury and resulted in prescription of rest, use of a cane and 600 mg. of Motrin. The physician believed that Mr. Cuthbertson would benefit from anti-inflammatory and pain medications.

Claimant also received treatment at University Hospital for removal of the five screws and a metal plate from his ankle on December 6, 2002. CX 1 at 128. On admission, examination revealed tenderness of the right ankle, limited range of motion and pain on extension. CX 1 at 129. The pre-operative diagnosis stated ankle fracture and painful hardware.

Dr. Michelle Tobao

On January 3, 2002, Mr. Cuthbertson began treating with Dr. Tobao for pain in his low back. CX 1 at 132. He treated at least a dozen times from January 2002 until the time of the hearing. Dr. Tobao diagnosed Claimant with degenerative disc disease in his spine by MRI and also a disc bulge. As of June 6, 2002, Dr. Tobao released Claimant to light duty with lifting no greater than five pounds. CX 1 at 163. During his appointments, Mr. Cuthbertson reported exacerbation of his pain symptoms upon exertion while doing things like washing dishes. CX 1 at 147. He admitted that he did not do his stretching exercises consistently and that he was able to go to the grocery store. Increases in medications did not provide good results for this Claimant. CX 1 at 150. As of September of 2002, Claimant reported to Dr. Tobao that his back muscle spasms were decreased. On examination, his lumbar flexion improved to 60 degrees from 40-50 degrees in March of 2002. CX 1 at 137, 150.

In October, an MRI of his low back showed degenerative changes, moderate arthrosis, in his L5-S1 facet and desiccation with decreased disc height. CX 1 at 155. The ankle MRI showed healed fracture in the toes and ankle. At his November appointment, Claimant received a referral for mental health services due to his depression over his physical condition and lack of ability to support his family. CX 1 at 153. In December, Claimant was referred to pain rehabilitation services as well as counseling services for his depression. CX 1 at 160. In January, Dr. Tobao opined that Mr. Cuthbertson should limit standing, sitting and walking to no more than 4-6 hours per day but no more than one hour uninterrupted. CX 1 at 164. Lifting no

more than five pounds without bending, stooping, reaching or using repetitive foot movements completed his work limitations. Dr. Tobao believed that these restrictions would last between nine and eleven months. By February of 2003, Claimant reported having been to the emergency room for back pain after he tried to retrieve something from under the couch. CX 1 at 161. He also wanted to hold off on getting spinal injections and instead asked to try decreasing his medications.

Vocational Reports

The claimant submitted the reports of Diane Rankin, a vocational evaluator, and of Jewish Vocational Services, a work assessment. Respondent submitted the report and labor market survey of Dr. Ralph Crystal, a vocational evaluator, and the market survey of Mr. Donald Follensbee.

Ralph Crystal

Mr. Crystal completed a vocational and occupational employability evaluation of Mr. Cuthbertson on June 20, 2002. RX 5. He reviewed the therapy noted from the home care and the physical therapy, as well as the treatment records of Drs. Sheridan, Roberts, Sorger, and Brannan. He also considered the vocational assessment of Mr. William Cody,[3] the report of Dr. Martin Fritzhand, the MRI's and x-rays, and a labor market survey of Concerta. RX 5 at 36. After conducting an interview and vocational testing with Mr. Cuthbertson, Mr. Crystal reached certain conclusions regarding education, employment, physical functioning and vocational abilities. Mr. Crystal determined from the vocational testing that Mr. Cuthbertson posses the manual dexterity to perform entry level assembly, bench work assembly, weighing, measuring and checking, sorting and packaging, polishing and cleaning, and cutting and trimming with machine operation. RX 5 at 41. Mr. Cuthbertson retains the ability to use his hands for gross bilateral dexterity activities.

After discerning his academic skill levels, Mr. Crystal found that Mr. Cuthbertson possesses the ability to perform math functions at a third grade level, reading at the third grade and spelling at the second grade levels. The test results meant that Mr. Cuthbertson could read and understand parts of the newspaper and could read and follow basic instructions as might be required for counter sales/clerk positions and entry-level cashier jobs. His reading proficiency, however, would prevent him from being able to enter a community college or technical school. His spelling abilities qualify him for a position as an inventory clerk or ship/receive position. However, his math function would present difficulties with entry-level calculations and is below the threshold, fourth grade level, to fully function in society. His literacy is labeled as "at best at a marginal level." Nonetheless, he would be able to function with the requisite academic skills for a wide range of entry-level jobs. Intelligence testing revealed a low average to borderline range of intellect. RX 5 at 42. He was unable to complete the tests for aptitude and interest due to his reading problems.

3 This report was not entered into evidence.

In Mr. Crystal's opinion, Claimant is qualified to perform his past heavy work, as to his ankle, based on Dr. Sorger's report, except for the disabling pain he experiences. RX 5 at 43. Drs. Sheridan and Brannon would permit him to perform his past work based on his back, however, Dr. Sheridan believes that he must have time restrictions for sitting and standing due to his ankle. Mr. Crystal believes that, although Mr. Cuthbertson is capable of physically performing a number of available jobs, his severity of pain "erodes his ability to perform work activities."

In relation to his academic abilities, Mr. Crystal opines that Claimant is borderline with regard to his ability to perform a wide range of entry-level jobs but does possess the decision-making and judgmental abilities to perform semi-skilled work. RX 5 at 43. Mr. Crystal listed a number of jobs that Mr. Cuthbertson could perform in keeping with his academic and physical restrictions and included positions with pay ranges of $7 to $10 per hour. He noted that with additional vocational training programs under the federal Workforce Investment Act, vocational training and a GED could led to a potential clerical position making $10 to $12 per hour. He recommends that Mr. Cuthbertson participate in an educational remediation program to obtain his GED. Included with this report is a listing of jobs available within a fifty-mile radius of Claimant's home.

On March 31, 2003, Mr. Crystal submitted an undated labor market survey listing stating that the jobs comport with Mr. Cuthbertson's physical restrictions.

Diane Rankin

Ms. Rankin submitted a vocational evaluation report conducted on July 3 and 5, 2001. Her report lists completion of the ninth grade but a fourth grade reading ability, a second grade spelling and a third grade math ability. CX 1 at 103. His IQ score of 72 places in him in the low borderline range of intelligence. His reasoning skills and abstraction ability appear to be consistent with this IQ as are his eye-hand skills. He needed the assistance of his wife on some of the questionnaires and did not complete the testing in one day. He carried out one and two sentence instructions but needed repeated encouragement. Mr. Cuthbertson scored at below average on all of the CAPS ability tests administered in specified vocational areas. CX 1 at 104. When tested for motor skills, Claimant scored below average for success in safely handling materials and accurately using measurements. Thereafter, Ms. Rankin's report ends with apparently missing pages. Claimant was not able to produce the full report.

The Jewish Vocational Work Assessment

On March 11, 12, and 13, 2002, Claimant participated in a vocational assessment revealing a third grade reading and spelling ability, a fourth grade arithmetic ability, and a 6.9 grade vocabulary level when given time-constraints. With time limitations, his reading comprehension level tested at grade 1.7 and improved to 4.5 grade without limitations. He could follow written instructions in keeping with his reading ability. He exhibited functional limitations in his attention to detail, work pace, and physical stamina. CX 1 at 108-109. He scored in the 30th percentile for electrical appliance manufacturing and in the 5th percentile in pins and collars assembly with a 70-75th percentile in screw assembly. These results suggest varying skills using

fine eye-hand coordination and fine hand tools, however, he exhibited good eye-hand coordination and manipulation of small hand tools. CX 1 at 111. After completing a simulated assembly test to assess tolerance for working in a standing position, Mr. Cuthbertson scored a 73% without an imposed work pace. A score of 100% is appropriate for entry-level competitive skills. When asked to stand as long as possible will assembling parts, Mr. Cuthbertson tolerated five minutes before needing to sit down. The remainder of the test he completed while alternating standing and sitting.

In summarizing his functional limitations, this vocational assessment discovered that Claimant has limitations in standing, walking, bending, and lifting. CX 1 at 114. He is uncomfortable sitting for long periods and requires the opportunity move around. He also needs to work at lesser pace especially if reading is required. He possesses lower academic skills, in particular reading comprehension when given any type of time constraints. Lastly, Mr. Cuthbertson reports being very depressed since the injury. In sum, the recommendations for Mr. Cuthbertson consist of placement in a position with few physical demands and with the ability to move freely and refreshment of his academic skills to increase his employability.

ANALYSIS

By stipulation, the parties agree that the claimant established his *prima facie* case that he suffered a work-related injury. Claimant showed that he suffered injuries resulting from a work-related accident. *Kelaita v. Triple Machine Shop*, 13 BRBS 326, 330-331 (1981); s*ee, also, Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Stevens v. Tacoma Boatbuilding Co*., 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). It is undisputed that Claimant suffered injuries to his back, ankle, toes and foot. Employer does not contest that Claimant received these injuries and that these injuries were work-related. What Employer contests is to what extent the Claimant's disability affects his ability to perform his prior or other work. The employer also contests that Claimant's back was injured in his work-related accident, arguing instead that he had an existing back problem that originated at a former place of employment.

However, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition; the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). When a claimant sustains an injury at work, followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. *Bludworth Shipyard v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981).

Employer's argument is not well taken where the rule is that if the second injury aggravates the claimant's prior injury, thus further disabling claimant, the second injury is the compensable injury, and liability must be assumed by the employer or carrier for whom claimant was working when "reinjured." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir**.** 1986) (*en banc*), *aff'g 1*5 BRBS 386 (1983); *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. OWCP*, 698

F.2d 1235 (9th Cir**.** 1982). While not specifically using the term, Employer appears to be arguing that under the "Credit Doctrine" the Employer's liability should be limited due to the prior injury to Claimant's back while working for his former employer. This is a misapplication of the doctrine, which applies in cases where the employee previously received compensation for an injury that now has been aggravated. The doctrine is predicated on the fact that the Employer should receive a "credit" for a previous payment of compensation relating to the same injury that has been aggravated. *See, e.g., Strachen Shipping Co. v. Nash*, 782 F2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (rehearing en banc), *aff'g* 15 BRBS 386 (1983). The doctrine is inapplicable under these facts. First, this employer did not make a prior payment of compensation to Claimant for the initial injury to his back. Second, the previous injury was resolved at the time of the accident at issue. Lastly, nothing in the record suggests that it was "aggravated" during the work-related incident in 2001. To the contrary, Claimant received his current lumbar injury when a 1500 lb piece of equipment slammed into his back with sufficient force to break his leg, ankle, foot and toes. Therefore, Employer's argument is irrelevant.

Therefore, the undersigned must determine whether Claimant has shown by a preponderance of the evidence that he is totally disabled due to his back, foot, and ankle injuries. To decide this issue, Claimant bears the burden to establish that he is not capable of returning to his former employment with the permanent disabling condition. The Claimant has the initial burden of proving total disability, as well as the burden of proving that the disability is permanent. *Eckley v. Fibrex and Shipping Co.*, 21 B.R.B.S. 120 (1998). The parties have stipulated to the dates of maximum medical improvement for Mr. Cuthbertson's back and foot. A residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989; *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Under these facts, Claimant has reached maximum medical improvement and, therefore, his disability is permanent.

Turning to the issue of the extent of Mr. Cuthbertson's disability, I note that Mr. Cuthbertson believes he is totally disabled. Employer counters this notion and contests his assertions of pain and discomfort, and his testimony as to his abilities. To establish a *prima facie* case of total disability, the Claimant must prove by a preponderance of the evidence that he cannot return to his regular or usual employment due to his work-related injury. The Claimant need not establish that he cannot return to any employment, only that he cannot return to his usual employment. *Elliot v. C & P Tel. Co*., 16 B.R.B.S. 89 (1984). If the Claimant satisfies this burden, the presumption exists that his disability is total. *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 B.R.B.S. 171 (1986).

"Usual" employment is the Claimant's regular duties at the time he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.,* 14 B.R.B.S. 689 (1982). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & C Tel. Co*., 16 B.R.B.S. 89 (1984). Further, the Claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp*., 22 B.R.B.S. 20 (1989). On the other hand, a judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth.,* 13 B.R.B.S. 337, 339 (1983).

The Claimant testified that his usual work was as stevedore, which entailed lifting, dragging, and manipulating a chain weighing 100 pounds and operating a forklift. Other duties included unloading various materials such as sand bags and steel beams. (TR 13, 15). Once he reached maximum medical improvement, Employer voluntarily paid Mr. Cuthbertson the compensation it believed was due for his permanent partial disability to his foot. Thus, it paid Claimant for a 7% "scheduled" permanent partial disability to his foot in accordance with § 8(c)(2) of the Act, 33 U.S.C. §§ 908(c)(2), (19). The medical evidence, however, is in conflict.

The Nature and Extent of the Claimant's Disability

The Act defines disability as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability continues for a lengthy period and lasts for indefinitely, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F. 2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp*., 22 B.R.B.S. 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co*., 22 B.R.B.S. 155, 157 (1989). As an initial issue, I will address Employer's surveillance videotape exhibit.

Employer offers four days of surveillance video, taken in April and May of 2002, to counter Mr. Cuthbertson's claims. RX 7. The video, the report, and the deposition of the investigator, it is shown that Mr. Cuthbertson is capable of driving his vehicle for short periods of time, of exiting and entering the vehicle without overt signs of physical distress, of bending over, of carrying a plate of covered food and of unloading several plastic bags of groceries from a charitable food bank. *Id.* The first three days of video contain lees than five minutes of activity per day. RX 7 at 115-116. Then in May of 2002, eighty-eight minutes of video capture Mr. Cuthbertson walking, driving and unloading groceries without signs of discomfort but with a noticeably altered gait at all times. Employer argues that although Claimant professed to use a cane, the video shows that he did not use one during the times he was filmed.

I find this surveillance evidence non-persuasive. First, a Claimant need not be bed-ridden in order to be considered disabled. The ability to drive short distances, to carry several plastic bags of groceries on occasion, to walk slowly for short periods, and to bend over at times, does not indicate that Claimant is not disabled. Second, the videotape did show that "at all times" Claimant walked with an altered gait, which serves to corroborate Claimant's complaints of pain. Third, Claimant testified, and related to his treating physicians, that he used a cane when walking "long" distances. *See, e.g.* CX 1 at 135. He did not attempt to exaggerate the need for his cane as Employer suggests. Consequently, I find that this evidence does not translate to an ability to perform these tasks: carrying, bending, walking and driving, in a work setting for an entire workday.

Next, I will address the issue of the stipulated 7% foot partial permanent disability. Under the Act, a scheduled injury can give rise an award for permanent total disability under 33

U.S.C. § 908 (a) if the evidence shows that Claimant is precluded from engaging in the only employment for which he is capable when considering his physical limitations and mental/ academic abilities.

The Foot/Toe Injuries

The parties have stipulated to a 7% whole man impairment related to Claimant's foot and toe fractures.

The Ankle Injury

In February of 2001, Claimant began treating with Dr. Sandra Eisele. After performing a physical examination, reviewing the objective tests, and taking a patient history, Dr. Eisele opined that Claimant would not be able to return to his previous employment but would benefit from 4-6 months of therapy for his foot and ankle. She did not address his back. Where her opinion relates solely to his foot and ankle but prior to reaching MMI, I cannot accord her opinion much weight as to the extent of Claimant's disability.

Dr. Richard Sheridan provided a consultative report in July of 2001. He examined Claimant, reviewed the objective test results, as well as the reports of Drs. Eisele and Sorger, and took Claimant's past vocational history. In Dr. Sheridan's opinion, Claimant achieved MMI with a 0% impairment related to his back. He also listed several ratings of impairments for his lower right foot and ankle as well as for his toes. The result was an 8% whole man impairment with nothing for his back. In a follow-up report issued on August 6, 2001, Dr. Sheridan issued final ratings on Claimant's disability at 7% for the ankle, 0% for the back and 15% for the foot. On October 9, 2001, he opined that Mr. Cuthbertson retained the physical capability to perform medium work with restrictions on sitting/standing time.

Dr. Martin Fritzhand examined the Claimant in January of 2002. He performed a physical examination, patient history, and list of subjective complaints. In conducting range of motion studies, Dr. Fritzhand noted marked depression and absent reflexes. He found that the objective testing performed corroborated Claimant's subjective complaints. In sum, he assessed a 38% whole man impairment of the foot, ankle, and back. Dr. Sheridan, however, submitted a rebuttal to Dr. Fritzhand's report. He stated that the report's comments were equivocal regarding absent reflexes and that the model used to assess the spine was inappropriate where Mr. Cuthbertson does not meet the criteria set forth. However, he did not identify the missing criteria. He also questioned what calculations Dr. Fritzhand used to arrive at the 38% figure.

Dr. Kohlaas also examined Claimant, opining that he had reached MMI on all three injuries. He performed an examination, including range of motion studies, and obtained a vocaional and medical history. He identified a 3% whole body impairment for the ankle but did not address the foot.

Upon review of the medical evidence and testimony discussed in detail above, I find that the preponderance of such evidence proves that the Claimant suffers from a disabling physical injury to his ankle caused by a work-related accident, which occurred on December 28, 2000.

After considering all the probative evidence including Dr. Kohlaas' assessment of 3%, Dr. Fritzhand's remaining 6% after subtraction for the foot and back, and Dr. Sheridan's 7%, I find that Claimant has a permanent partial disability to his ankle that prevents him from performing his previous employment.

The Back Injury

Claimant submitted numerous medical reports. The first, Dr. Sorger's of January 2001, opined that Claimant could return to work after his next appointment. However, at the next appointment, he prescribed additionally physical therapy, more pain medication and anti-inflammatory prescriptions. As of April of 2001, he referred Claimant to a chiropractor for evaluation of his ankle and back. Notably missing from Dr. Sorger's reports, is a job description of Claimant's position with Employer. Furthermore, Dr. Sorger's final comments regarding Claimant's ability to work are ambiguous. He stated that Mr. Cuthbertson could return to work "as far as I'm concerned" but then stated that "he can't work with this pain. I have encouraged him to talk to his lawyer about getting him rated for disability." Due to the equivocation of Dr. Sorger, I find his report less than probative.

Turning to Dr. John Roberts, he opined that Claimant had not reached MMI but had a total temporary impairment. During the term of treatment, he released Claimant to sedentary duty with lifting of no more than ten pounds, sitting and occasional standing. He relied on his examinations of Claimant as well as the results of his objective testing. However, due to his back condition, he opined that Claimant could not return to even sedentary duty as of September 4, 2001. I find his report probative and credible where he relied on both a physical examination and objective testing to reach his conclusion that Claimant was incapable of doing even sedentary work as to his back. Additionally, Dr. Roberts operated as a treating physician and not just as a consultative physician.

Thereafter, Dr. Brannon treated Claimant for his ankle and back. He ordered numerous physical therapy sessions and a chronic pain management program but did not offer an opinion as to the extent of Claimant's disability after he reached MMI except to say that the therapy was not very helpful. As a result, I find this opinion does not offer probative evidence as to the extent of Claimant's disability.

Dr. Richard Sheridan provided a consultative report in July of 2001. He examined Claimant, reviewed the objective test results, as well as the reports of Drs. Eisele and Sorger, and took Claimant's past vocational history. In Dr. Sheridan's opinion, Claimant achieved MMI with a 0% impairment related to his back. I find his opinion credible and probative.

Dr. Martin Fritzhand examined the Claimant in January of 2002. He performed a physical examination, patient history, and list of subjective complaints. In conducting range of motion studies, Dr. Fritzhand noted marked depression and absent reflexes. He found that the objective testing performed corroborated Claimant's subjective complaints. In sum, he assessed a 38% whole man impairment of the foot, ankle, and back. Dr. Sheridan, however, submitted a rebuttal to Dr. Fritzhand's report noting that the model used to assess the spine was inappropriate

where Mr. Cuthbertson did not meet the criteria set forth. However, he did not identify the missing criteria or discuss why the criteria were not met. He also questioned what calculations Dr. Fritzhand used to arrive at the 38% figure. I note that Dr. Fritzhand identified the Tables and Figures used for each element of injury rather than the numerical figure. Consequently, I find that his calculations were not so indefinite as to make his report unreliable. Furthermore, I find that Dr. Fritzhand credible and logically arrived at his stated opinion by a thorough and complete examination, patient and injury history, and comprehensive objective testing.

Dr. Kohlaas, Board-certified orthopedic surgeon, examined Claimant on September 9, 2001, opining that he had reached MMI on all three injuries. He performed an examination, including range of motion studies, and obtained a vocational and medical history. He identified 3% whole body impairment for the ankle and no back impairment. He believed that the objective testing did not corroborate the subjective complaints of pain and that the lumbar sprain injury was fully resolved. However, he did not state why the subjective complaints were not corroborated nor did he provide the basis for his conclusion that the lumbar injury was resolved.

Lastly, Dr. Tabao treated Mr. Cuthbertson for his back pain and for his attendant depression for many months. Although she did not directly express an opinion regarding his ability to return to his former employment, she did continue to treat him for chronic pain management, prescribing significant medications to address his ongoing pain. I find her treatment records and Mr. Cuthbertson's medications support his assertions of pain.

In *Mazze v. Frank J. Holleran, Inc.*, the Board affirmed the administrative law judge's award of five percent disability for the claimant's "slight" permanent injury to his right leg due to the tenderness in the knee. After one physician rated the disability as a 17.5% loss but two other physicians rated no loss, the judge awarded the five percent loss. The judge selected that rating because he found tenderness but "no loss of flexion or rotation and continued ability to perform his work." 9 BRBS 1053, 1055 (1978).

Under these facts, all of Mr. Cuthbertson' physicians found tenderness as well as some loss of flexion and rotation. Additionally, I note that Dr. Sorger believed that Claimant could not work due to his level of pain and, thereafter, referred him for more therapy. Credible assertions of pain are sufficient to support a finding of total disability.[4] *Eller & Co. v. Golden,* 620 F.2d 71 (5th Cir. 1980). Admittedly, Dr. Kohlaas did not believe that Mr. Cuthbertson's pain symptoms were corroborated by the objective tests; however, other physicians not only disagreed but also prescribed repeated physical therapy and pain management treatments for him. Dr. Fritzhand reached the opposite conclusion: finding that the subjective complaints were confirmed by the objective tests. Additionally, Dr. Roberts opined that Mr. Cuthbertson is incapable of even sedentary work based on his back. Claimant continued to treat for his back pain with Dr. Tobao as of the time of the hearing. Where I give more credence to the treating physicians' opinions than to the opinions of the consultative physicians, I find that Claimant has established that his

4 A claimant's credible testimony may constitute substantial evidence justifying an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 1- 51, 33 U.S.C.A. §§ 901-950.

back tenderness and pain prevent him from returning to his prior employment. *See Eller and Co. v. Golden*, 620 F.2d 71, 73 (1980).

Employer attempts to argue that where Claimant suffered a back injury at his previous, non-longshore employment, that this injury is an aggravation of an existing injury and consequently, not compensable by Employer. To support this contention, Employer placed in evidence a pre-employment physical examination report prepared for Griffin Industries in May of 2000. RX 12. The report notes a prior back injury but also states that it had fully resolved, the physician having found no tenderness of, spasm, deformity, or decreased range of motion. Accordingly, Employer's arguments are not well-taken and further, are a direct misstatement of the law. *See CAN Ins. Co. v.* Legrow, 935 F.2d 430, 436 (1st Cir. 1991); *Lockheed Shipbuilding v. Director, Office of Worker's Compensation* Programs, 951 F.2d 1143, 1145 (9th Cir 1991)("Previously sustained back injury does not, standing alone, establish that he had a pre-existing back partial dis-ability"). Where a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Laplante v. General Dynamics Corp./Elec. Boat Div.*, 15 BRBS 83 (1982).

Regardless of whether the initial injury occurred at the previous employment or while working for this employer, this back injury is compensable from Employer where the previous injury was not covered under the Act. *Supra.* Additionally, I note that Employer bears the burden of rebutting the presumption that Claimant's complaints are casually related to his work injury. 33 U.S.C. § 920(a). The employer's burden, to establish by substantial evidence that the presumed relationship between Claimant's injury and a resultant disability has not been met. Claimant's testimony regarding the arduous nature of his employment, the necessity of bending and stooping while dragging and placing a chain weighing up to 100 lbs, is unchallenged. Where he has established consistent limitations on his exertional activities due to his back, I find that he established a sufficient injury that prevents him from performing his previous strenuous job.

In sum, I find that Claimant has shown by a preponderance of the credible medical evidence that he has a partially disabling injury to his back, which prevents him from performing his prior employment. After considering the reports of the various physicians, I find most probative treating physician Dr. John Roberts and consultative physician Dr. Fritzhand. Both relied on objective data and found Claimant's subjective reports of pain corroborated and Dr. Fritzhand conducted the most recent examination of Claimant. Where Dr. Roberts opined that Claimant could not perform even sedentary work and Dr. Fritzhand assessed a total disability for the ankle and the back at 31%,[5] I find that Mr. Cuthbertson is unable to perform his heavy, manual labor stevedore position.

5 Dr. Fritzhand's estimate may appear to be somewhat inflated when considered against the other physicians' opinions. However, even assuming a fifty-percent reduction in his estimate, I would still find that Claimant is incapable of returning to strenuous, heavy manual labor of his former position.

Conclusion

After examining the physicians' opinions, the objective testing, and the Claimant's credible testimony, I find the evidence supports Claimant's assertion of total disability due to his back, ankle and foot in combination and therefore, I find that he is unable to return to his prior employment due to these disabilities.

Claimant's Wage Earning Capacity

As Claimant has met his burden of proving the nature and extent of his disability and his inability to return to his former work, the next question is whether Employer produced sufficient evidence to reduce Claimant's disability status from total to partial. To determine benefits for the injuries, the nature, extent and duration of the Claimant's disability from this work-related injury must be assessed by examining wage earning capacity. Claimant has provided sufficient evidence that he is capable of only entry-level jobs that do not require math or reading ability beyond the most rudimentary level. Additionally, based on the testing conducted, Claimant is not able realistically to perform assembly work involving small components. As to his experiences, Claimant's past work, as a hide grader and as a manual laborer, limit his chances for employment that requires any other type of prior experience with the exception of operating a forklift on occasion. Furthermore, I find that Claimant also must have employment with limited standing and walking as well as lifting, bending, twisting and squatting. The parties have stipulated that Claimant has a scheduled injury to his foot that also operated to limit his functionality.

A scheduled injury, however, "can give rise to an award for permanent total disability under 33 U.S.C. § 908(a) where the facts establish that the injury prevents the employee from engaging in the only employment for which he is qualified." *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, U. S. Dept. of Labor*, 449 U.S. 268, 279 n.17 (1980). An employer may avoid liability under § 8(a) for total disability if it demonstrates that suitable alternative employment is available to the employee in his community.

If Employer can establish the availability of alternative employment by proving that Claimant could earn wages in regular, continuous employment; employer meets its burden by establishing that there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

An employer can establish suitable alternate employment by offering an injured employee a light duty job tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986). The record does not reflect any offer of alternative employment extended to Claimant. Therefore, a failure to prove suitable alternative employment, available with outside employers, may result in a finding of total disability. *Manigault v. Stevens Shipping Co*., 22 B.R.B.S. 332 (1989); *MacDonald v. Trailer Marine Trans. Corp*., 18 B.R.B.S. (1986), *aff'd*, (No. 86-3444)(11th Cir. 1987)(unpub).

The standards for determining total disability are the same regardless of whether temporary or permanent disability is claimed. *Bell v. Volpe/Head Construction Co.,* 11 B.R.B.S. 377 (1979). The degree of the Claimant's disability, *i.e*. total or partial, is determined not only on the basis of physical condition, but also on other factors, such as age, education, employment history, rehabilitative potential, and the availability of work. Thus, it is possible under the Act for a Claimant to be deemed totally disabled even though he may be physically capable of performing certain kinds of employment. *New Orleans (Gulfwide) Stevedore v. Turner*, 661 F. 2d 1031, 1038 (5th Cir. 1981); *see also Lentz v. Cottman Co.*, 852 F2d 129, 131 (4th Cir. 1988).

Of the numerous alternative employment opportunities proffered by Employer, I note that many of them violate the physical restrictions placed on Claimant by his ankle (standing and walking restrictions) and foot (no repetitive motions, ability to move around) and back (no heavy lifting, limitations on sitting). Additionally, all of the vocational reports concur than Claimant's academic abilities and skills training qualify him for entry-level positions at most. Due to his functional reading and math abilities at third-fourth grade levels, many positions are beyond his current aptitude. Lastly, his eye-hand coordination is sufficient, albeit slow, to work with hand tools but his manual dexterity would not permit him to work with small components.

Employer, however, listed as possible alternative employment numerous jobs that do not fit Claimant's abilities, physical or academic. Although all the vocational experts believed that there were job positions in general that Claimant could perform, the specific, actual jobs Employer proffered are beyond Claimant's abilities or experiences. For example: production worker (part-time only, must lift 35lbs), warehouse worker (must climb ladders and lift), shipper/receiver (must be able to maintain documentation and be familiar with shipping procedures and tracking inbound freight), light industrial (previous experience with tool and die required), assemblers (use of tweezers, bending 25%, crouching 25%, standing 50%, twisting 76+%), security officer (lots of walking), truck driver (driving and loading barrels of 35lbs), material handler (must be good with math), bicycle assembler (experienced), warehouse (experienced), assembler (bending and stooping), assembler (will assemble electrodes, must have manual dexterity and ability to count and keep records), general labor (lift 100 lbs, computer entry, basic math-decimals, fractions, calculate formula yields, shipping and receiving), machine operator (must be able to read prints and calibrate using calipers and micrometers), plastic injection molding (must have previous experience in plastic mold injectors), general labor (lay sewer pipes in ditches), general warehouse (must be able to lift 25-50 lbs), assembly (utilize drawings and schematics to assemble circuit boards, requires high school diploma), assembly (must stand 8 hours a day), light industrial (must have production/packaging), warehouse (must have high school diploma, use computerized systems for tracking, forklift certification, stand entire shift), inspector (50-60 lbs lifting), woodworker (needs experience), and environmental service worker (high school grad or equivalent). RX 5.

Employer also submitted a list of positions from vocational consultant Donald Follensbee. RX 6. However, this report was prepared based solely on Dr. Sheridan's

report of Claimant's physical limitations, which did not address his back. The listed available positions, with a few exceptions, failed to establish alternative employment for Claimant and certainly did not take into account Claimant's assertions of pain and his other physical limitations, i.e…twisting, bending, and stooping. The few listed exceptions do not meet Employer's burden because they only appear to be suitable where the qualifications and physical requirements were omitted from the listing. For example, janitorial work at a hotel could be possible for Mr. Cuthbertson if standing were not required the whole day or much bending to clean bathtubs or if the job constituted mostly towel folding. However, this is not apparent in this evidence as submitted by Employer. In theory, there are potential jobs that Mr. Cuthbertson could be capable of performing in keeping with the physicians' opinions and the vocational experts. The actual available jobs as presented by Employer are not suitable for Claimant. Employer must not only show the existence of available positions but also the suitability of those positions. *CNA Insurance Co. v. Legrow,* 935 F.2d 430, 435 (1st Cir. 1991).

Employer bears the burden of establishing that suitable jobs are available. Where only a few jobs are listed[6] without the necessary physical and educational requirements included, I will not consider this sufficient evidence to meet Employer's burden. In accordance with *Universal Maritime Corp. v. Moore*, I reject the few listed exceptions as possible available jobs where the Employer did not supply standard job descriptions as is permitted by other compensation programs such as Social Security Disability Insurance. 126 F.3d 256, 265 (4th Cir. 1997); *but cf, CNA Insurance Co. v. Legrow,* 935 F.2d at 434-435 (where claimant worked for a brief time as a security guard after his injury but the record did not reveal the hours, nature of the duties, whether it required walking, whether it was physically demanding or whether sitting and standing were permitted, the Court held that the Employer did not meet its burden. The Court stated that the employer "failed to provide any evidence of concerning the precise nature, terms, and availability of the job or the identity of the employer.")

The vocational experts here offered "security guard" as a possible occupation for Mr. Cuthbertson. However, the security guard opening proffered by Employer requires a lot of walking, which precludes Claimant. Additionally, the vocational experts listed shipping and receiving as a potential employment for Claimant. However, the listed opening supplied by Employer required either prior experience, ability to use a computer, or to engage in complex math computations and paperwork. In sum, the few positions provided by Employer, which could possibly appear to be suitable for Claimant, are too incomplete as to job description to relieve Employer of its burden.

Employer makes the argument that any liability on its part can be negated unless Claimant meets his burden of showing diligent efforts to obtain outside employment. This argument is without merit. *See, Director OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1991). The burden to pursue diligently outside employment falls to Claimant only if Employer meets its burden in establishing suitable available employment that

6 Employer submitted several job surveys. Due to the older, out-of-date surveys, I relied on the most recent survey from 2003 to reach my conclusions and did not accord any relevance to the 2001-02 surveys.

comports with Claimant's physical limitations and abilities. Longshore and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq., *Edwards v. Director, Office of Worker's Compensation Programs,* 999 F.2d 1374, 1376 n. 2 (9th Cir. 1993); *Roger's Terminal & Shipping & Dry Dock Co. v. Director, Office of Worker's Compen-sation Programs,* 784 F.2d 687, 691 (5th Cir. 1986). Where Employer failed to do so, I reject its evidence and find it insufficient.

Additionally, the evidence shows that Claimant has attempted to find employment. Both Mr. Cuthbertson and his wife testified credibly that he has applied for positions but has been turned down where he was physically incapable of performing the work. Employer counters this evidence by asserting that under the Americans With Disabilities Act, employers must accommodate a disabled employee. *See* Employer's Post-hearing Brief at 20. This argument is invalid and not in keeping with the LHWCA, which allocates the burdens of the respective parties. Consequently, I find that Employer has failed to carry its burden of showing suitable and available alternative employment based on Claimant's physical limitations, age, experience, and skills. *Walker v. Sun Shipbuilding and Dry Dock Co., supra.*

Therefore, where Claimant has established by a preponderance of the evidence that he is totally and permanently disabled, and where Employer failed to present sufficient evidence of suitable alternative employment, Claimant is entitled to an award of compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I make the following compensation Order. The District Director shall administratively perform the specific dollar computations of the compensation award.

ORDER

It is hereby ORDERED that, Claimant be entitled to

1. Permanent total disability benefits, under 33 U.S.C. § 908(a) of 66 and 2/3 of his average weekly wage for the duration of his total disability and;

2. Future medical costs related to his ankle, foot, and back, including his treatment to date with Dr. Tabao, and;

3. Attorney fees associated with the costs of bringing this action.

In accordance with this ORDER, Claimant has thirty (30) days from the date of this ordered to submit a fee petition. Thereafter, Employer shall have twenty (20) days to submit a response to the fee petition and Claimant shall then have ten (10) days thereafter to file a reply. At that time, I will also address the previously submitted fee petition from Claimant's original counsel. Objections and comments regarding that petition should be included in the above scheduled briefs.

SO ORDERED,

A

JOSEPH E. KANE
Administrative Law Judge